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NORTHERN DISTRICT OF CALIFORNIA

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

CV 12 5323

MARY EMILY FUNKE, Individually and on
behalf of all others similarly situated,

Case No.

Plaintiff,

CLASS ACTION COMPLAINT

v.

DEL MONTE CORPORATION and MILO'S
KITCHEN LLC,

JURY TRIAL DEMANDED

Defendants.

CLASS ACTION COMPLAINT

FILED BY FAX
PURSUANT TO LOCAL RULES

1 Plaintiff Mary Emily Funke, by and through her attorneys, brings this putative class action
2 on behalf of herself and all other similarly situated persons defined below (the "Class"), against
3 Del Monte Corporation ("Del Monte") and Milo's Kitchen LLC ("Milo's") for damages and
4 injunctive relief. Plaintiff alleges matters pertaining to herself and her own acts upon personal
5 knowledge, and as to all other matters upon information and belief, based upon the investigation
6 undertaken by counsel, as follows:

7 INTRODUCTION

8 1. In September 2012, Plaintiff Mary Emily Funke fed her dog, Rocky, chicken jerky
9 and beef jerky sold by Milo's ("Milo's Jerky"). At the time, Rocky was in excellent health and
10 had a standard and healthy canine diet. Soon after consuming Milo's Jerky, Rocky became ill,
11 and passed away several days later.

12 2. Many dogs who have eaten Milo's Jerky have subsequently gotten sick, or even
13 died, as a result. Since 2007, the Food and Drug Administration ("FDA") has warned that jerky
14 dog treats, especially jerky dog treats produced in China (as Milo's Jerky is), may contain
15 contaminants which cause sickness or even death to dogs that eat the jerky. The FDA has
16 received over 2,000 complaints concerning jerky manufactured by different companies, and at
17 least fifteen complaints from dog owners who fed their dogs Milo's Jerky.

18 3. Despite these dangers, Defendants misrepresent, through packaging and websites,
19 that, among other things:

- 20 • Milo's Jerky is "wholesome" and "good for pets";
- 21 • Milo's Jerky is made with the "same quality ingredients and care" as quality
22 human food;
- 23 • Milo's Jerky is "100% jerky";
- 24 • Milo's uses a "detailed 17-step safety process, where [Milo's Jerky] is required to
25 pass quality testing during every single phase," which is successful in preventing
26 Milo's Jerky from becoming contaminated; and
- 27
- 28

- the FDA's investigation of Milo's Jerky and other jerky brands was conducted adequately.

4. Defendants' misrepresentations and failure to adequately address contamination in Milo's Jerky has caused, and will continue to cause, dogs like Rocky to become sick and/or die. Defendants knew or should have known that Milo's Jerky is unsafe, yet Defendants continue to market and sell Milo's Jerky and moreover, failed to warn Plaintiff and the Class of the dangers associated with Milo's Jerky.

5. Plaintiff brings this action to stop tragedies like this from occurring, and to compensate dog owners who purchased Milo's Jerky.

PARTIES

6. Plaintiff Mary Emily Funke resides in Pacific Palisades, California. In September 2012, her dog Rocky became sick and died as a direct result of consuming Milo's Jerky. Plaintiff suffered damages resulting from her purchase of Milo's Jerky, including thousands of dollars in various veterinary costs and the loss of the value of her dog.

7. Defendant Milo's Kitchen LLC is headquartered at One Maritime Plaza San Francisco, California 94111. Milo's is a subsidiary defendant Del Monte Corporation. Defendant Milo's manufactures, distributes, and sells Milo's Jerky. Milo's Jerky is originally produced at a plant in China.

8. Defendant Del Monte Corporation ("Del Monte"), the owner of Milo's, is headquartered at One Maritime Plaza, San Francisco, California 94111.

9. Del Monte describes itself, on the "Investor Relations" page of its website, as "one of the country's largest producers, distributors and marketers of premium quality, branded pet products and food products for the U.S. retail market, generating approximately \$3.7 billion in net sales in fiscal 2012." Del Monte owns several pet food brands in addition to Milo's, including Meow Mix®, Kibbles 'n Bits®, Milk-Bone®, 9Lives®, Pup-Peroni®, Gravy Train®, Nature's Recipe®, and Canine Carry Outs®.

10. As a parent company and owner of Milo's, Del Monte had complete authority and control over Milo's conduct.

JURISDICTION AND VENUE

11. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332(d)(2), because the matter in controversy, upon information and belief, exceeds \$5,000,000, exclusive of interests and costs, and this matter is a class action in which at least two-thirds of Class members are citizens of a different state than that of Defendant. Venue in this Court is proper pursuant to 28 U.S.C. § 1391(a) and (c) since all defendants do business in this District and are headquartered in this District. Each of the Defendants has promoted, marketed, distributed and/or sold Milo's Jerky in this District.

12. Venue is proper in this Court pursuant to 28 U.S.C. § 1391, because the acts of Defendants occurred in this County.

SUBSTANTIVE ALLEGATIONS

Plaintiff's Dog Dies As A Result Of Eating Milo's Jerky

13. Plaintiff's dog, Rocky, born in 2007, was a King Charles Cavalier Spaniel.¹ Until his death in September 2012, Rocky had no history of health problems, apart from a hip replacement a year earlier.

14. In August 2012, Plaintiff bought Milo's Jerky for Rocky.

15. On September 2, 2012, Plaintiff fed Rocky Milo's Jerky. Within 24 hours, Rocky got sick. Symptoms first arose when Rocky drank an inordinate amount of water, and then vomited the water approximately twelve times.

¹ King Charles Cavalier Spaniels are small dogs, and adults generally weigh 13 to 18 pounds. The natural lifespan of this breed is generally between 9 and 14 years. While this breed is prone to mitral valve heart disease, spinal court issues, ear problems, and hip dysplasia, this breed is not typically prone to digestive problems.

1 16. On September 4, 2012, the day after Rocky developed these symptoms, Plaintiff
2 took Rocky to the veterinarian. The veterinarian prescribed antibiotics to combat these
3 symptoms.

4 17. However, Rocky's condition quickly deteriorated and he became so sick he could
5 barely walk. Plaintiff returned to the veterinarian with Rocky on September 5, 2012, and the
6 veterinarian gave Rocky fluids intravenously. The veterinarian also kept Rocky in the office to
7 monitor Rocky's failing health.

8 18. On September 8, 2012, Rocky became so gravely ill that Plaintiff and the
9 veterinarian were forced to euthanize him. After Rocky died, the veterinarian kept Rocky's body
10 and had pathology reports done. One of the reports found that Rocky had: (1) necrotic tissue in
11 his stomach; (2) pancreatitis; and (3) highly elevated liver enzyme levels. Rocky had no other
12 health problems that would explain this pathology. The veterinarian believes (1) that Rocky died
13 from food poisoning and (2) Rocky's food poisoning was caused by eating Milo's Jerky.

14 19. Plaintiff not only suffered the death of her dog Rocky, but was forced to spend
15 thousands of dollars in veterinary bills to treat Rocky before he died.

16 20. Upon information and belief, Rocky is only one of hundreds, if not thousands, of
17 dogs across the United States who became sick after eating Milo's Jerky. However, as stated
18 below, since at least 2007, many dogs have become ill after eating jerky such as Milo's Jerky.
19 Much of this jerky, including Milo's Jerky, is manufactured in China.

20
21 **The FDA Was Aware Of Possible**
22 **Contamination In Jerky Since 2007**

23 21. On September 26, 2007, the FDA issued a release titled "FDA Cautions
24 Consumers about Chicken Jerky Products for Dogs" which warned:

25 The Food and Drug Administration is cautioning consumers of a potential
26 association between development of illness in dogs and the consumption of
27 chicken jerky products also described as chicken tenders, strips or treats. **FDA has
28 received more than 70 complaints involving more than 95 dogs that**

1 experienced illness that their owners associated with consumption of chicken
2 jerky products.

3 ***

4 FDA has also received preliminary information from Banfield, The Pet Hospital
5 which suggests an association between exposure to the chicken jerky products and
6 signs of gastrointestinal illness (vomiting, diarrhea and bloody diarrhea).

7 **Dogs that have become ill, typically show the following signs: decreased food**
8 **consumption, although some may continue to consume the treats to the**
9 **exclusion of other foods; decreased activity or lethargy; vomiting; diarrhea,**
10 **sometimes with blood; and increased water consumption and/or increased**
11 **urination. Some or all of these signs may be present in any individual. Blood**
12 **tests may indicate kidney failure (increased urea nitrogen and creatinine).**
13 **Urine tests may indicate Fanconi syndrome (increased glucose). Although**
14 **most dogs appear to recover, some reports to the FDA have involved dogs**
15 **that have died.**

16 ***

17 [Emphasis added.]

18 22. Rocky exhibited many of the same symptoms described in paragraph 21 above
19 after he ingested Milo's Jerky.

20 23. On December 19, 2008, the FDA issued a release titled "Preliminary Animal
21 Health Notification - Chicken Jerky Products for Dogs" which revealed that many of the jerky
22 products at issue were produced in China, and warned:
23

24 The Food and Drug Administration (FDA) continues to caution consumers of a
25 potential association between the development of illness in dogs and the
26 consumption of chicken jerky products also described as chicken tenders, strips or
27 treats. FDA continues to receive complaints of dogs experiencing illness that their
28 owners or veterinarians associate with consumption of chicken jerky products. The
chicken jerky products are imported to the U.S. from China. FDA issued a
cautionary warning to consumers in September 2007.

Australian news organizations report the University of Sydney is also investigating
an association between illness in dogs and the consumption of chicken jerky in
Australia. At least one firm in Australia has recalled their chicken jerky product
and the recall notification stated the chicken jerky product was manufactured in
China.

1 FDA believes the continued trend of consumer complaints coupled with the
 2 information obtained from Australia warrants an additional reminder and animal
 health notification.

3 ***

4 FDA is advising consumers who choose to feed their dogs chicken jerky
 5 products to watch their dogs closely for any or all of the following signs which
 6 may occur within hours to days of feeding the product: decreased appetite,
 7 although some may continue to consume the treats to the exclusion of other
 8 foods; decreased activity; vomiting; diarrhea, sometimes with blood; and
 9 increased water consumption and/or increased urination. If the dog shows
 10 any of these signs, stop feeding the chicken jerky product. Owners should
 11 consult their veterinarian if signs are severe or persist for more than 24
 hours. Blood tests may indicate kidney failure (increased urea nitrogen and
 creatinine). Urine tests may indicate Fanconi syndrome (increased glucose).
 Although most dogs appear to recover, some reports to the FDA have
 involved dogs that have died.

12 ***

13 [Emphasis added.]

14 24. On November 18, 2011, the FDA issued a release titled "FDA Continues to
 15 Caution Dog Owners About Chicken Jerky Products" which reiterated warnings concerning
 16 jerky, especially jerky made in China:

17 **The Food and Drug Administration (FDA) is again cautioning consumers that**
 18 **chicken jerky products for dogs (also sold as chicken tenders, strips or treats)**
 19 **may be associated with illness in dogs. In the last 12 months, FDA has seen an**
 20 **increase in the number of complaints it received of dog illnesses associated**
 21 **with consumption of chicken jerky products imported from China. These**
 22 **complaints have been reported to FDA by dog owners and veterinarians.**

23 FDA issued a cautionary warning regarding chicken jerky products to consumers
 24 in September 2007 and a Preliminary Animal Health Notification in December of
 2008. After seeing the number of complaints received drop off during the latter
 part of 2009 and most of 2010, the FDA is once again seeing the number of
 complaints rise to the levels of concern that prompted release of our earlier
 warnings.

25 ***

26 FDA is advising consumers who choose to feed their dogs chicken jerky
 27 products to watch their dogs closely for any or all of the following signs that
 28 may occur within hours to days of feeding the products: decreased appetite;

1 decreased activity; vomiting; diarrhea, sometimes with blood; increased
 2 water consumption and/or increased urination. If the dog shows any of these
 3 signs, stop feeding the chicken jerky product. Owners should consult their
 4 veterinarian if signs are severe or persist for more than 24 hours. Blood tests
 5 may indicate kidney failure (increased urea nitrogen and creatinine). Urine
 6 tests may indicate Fanconi syndrome (increased glucose). Although most dogs
 7 appear to recover, some reports to the FDA have involved dogs that have
 8 died.

9 ***

10 The FDA continues to actively investigate the problem and its origin. Many of
 11 the illnesses reported may be the result of causes other than eating chicken
 12 jerky. Veterinarians and consumers alike should report cases of animal illness
 13 associated with pet foods to the FDA Consumer Complaint Coordinator in their
 14 state or go to <http://www.fda.gov/petfoodcomplaints>.

15 [Emphasis added.]

16 25. On July 18, 2012, the FDA released a bulletin titled "Questions and Answers
 17 Regarding Jerky Pet Treats"² which was then updated on August 15, 2012. This bulletin
 18 discussed concerns about various jerky treats, and provided updates on the FDA's investigation of
 19 such treats. The updated version of the bulletin provided as follows:

20 **Why did FDA issue a cautionary update in November 2011?**

21 In 2011, FDA saw an increase in the number of complaints it received of dog
 22 illnesses associated with consumption of chicken jerky products imported from
 23 China.

24 FDA previously issued a cautionary warning regarding chicken jerky products to
 25 consumers in September 2007 and a Preliminary Animal Health Notification in
 26 December of 2008. The number of complaints being received dropped off during
 27 the latter part of 2009 and most of 2010. However in 2011, FDA once again started
 28 seeing the number of complaints rise to the levels of concern that prompted release
 of our earlier warnings.

² The bulletin also noted that the FDA tested samples of various brands of jerky for contamination by salmonella, metals, furans, pesticides, antibiotics, mycotoxins, rodenticides, nephrotoxins (such as aristolochic acid, maleic acid, paraquat, ethylene glycol, diethylene glycol, toxic hydrocarbons, melamine and related triazines), as well as other select toxins. The FDA conducted only four tests on samples of the Milo's Jerky. While none of the four samples tested positive for contamination, this was a limited sample study, and does not in any way demonstrate that Milo's Jerky is safe.

1 Since the issuance of the CVM Update on November 18, 2011, the agency has
2 received numerous additional complaints regarding chicken jerky products.

3 26. The bulletin also attempted to explain why it was not conducting a recall of jerky:

4 **Why aren't these products being taken off the market?**

5 There is nothing preventing a company from conducting a voluntary recall. It is
6 important to understand that unless a contaminant is detected and we have
7 evidence that a product is adulterated, we are limited in what regulatory actions we
8 can take. The regulations don't allow for products to be removed based on
9 complaints alone. This is an ongoing investigation and FDA will notify the public
if a recall is initiated. Currently, FDA continues to urge Dog owners to use caution
with regard to jerky pet treat products.

10 27. The bulletin discussed the FDA's investigation of jerky facilities in China:

11 **Has FDA conducted any inspections of facilities in China?**

12 Yes. During April 2012, FDA conducted inspections of several facilities in China
13 that manufacture jerky pet treats.

14 **How did FDA determine which facilities to inspect in China?**

15 FDA selected these firms for inspection because the jerky products they
16 manufacture have been associated with some of the highest numbers of pet illness
reports in the U.S.

17 **What did the FDA learn from the inspections?**

18 The inspections provided valuable information on the firms' jerky pet treat
19 manufacturing operations, including ingredients and raw materials used in
20 manufacturing, manufacturing equipment, the heat treating of products, packaging,
21 quality control, sanitation, and product testing. Although these inspections helped
22 to identify additional areas that we may investigate, FDA found no evidence
indicating that these firms' jerky pet treats are the cause of pet illnesses in the
United States.

23 ***

24 **What is FDA doing in addition to inspecting Chinese manufacturing
25 facilities?**

26 In follow-up to these inspections, FDA sent a delegation to China in April to
27 express to [the Administration of Quality Supervision, Inspection and Quarantine
28 ("AQSIQ")] our concerns about the complaints we continue to receive concerning
jerky pet treat products imported from that country. As a result, FDA and AQSIQ

1 agreed to expand the investigation of jerky pet treats. In addition to sharing our
2 epidemiological findings with AQSIQ, we initiated a scientific collaboration, and
3 we have taken other steps to attempt to identify the root cause of the illness
4 complaints. FDA and AQSIQ are meeting regularly to share findings and discuss
5 further investigational approaches.

6 28. The bulletin also included a spreadsheet detailing complaints received by the FDA.
7 From January 1, 2007 to July 2, 2012, the FDA received fifteen complaints concerning dogs
8 becoming sick after ingesting Milo's Jerky.

9 **Members Of Congress Criticize the FDA's Investigation Of Jerky Treats**

10 29. On July 26, 2012, Senator Barbara Boxer and Congressman Jerry McNerney both
11 wrote to the Honorable Margaret Hamburg, commissioner of the FDA, to request more aggressive
12 action by the FDA concerning tainted jerky treats.

13 30. Senator Boxer stated that "I fear that the FDA's warnings have not reached
14 consumers, who through no fault of their own end up purchasing these tainted treats." She urged
15 the FDA "to continue dedicating the necessary resources to find the source of the contamination,
16 take greater steps to alert customers of the dangers posed by them, and pull from the market any
17 products that are found to cause harm."

18 31. Congressman McNerney also requested greater action by the FDA, and urged the
19 FDA to "strongly consider" removing jerky from store shelves. He stated that:

20 I am aware that the FDA continues to investigate incidents involving chicken
21 jerky, but this problem has persisted for far too long. I strongly urge the FDA to
22 further investigate the origin of these dog treats and why they are toxic. Until the
23 FDA is able to determine what is causing these adverse reactions in pets, the
24 agency should make additional efforts to inform consumers about the potential
25 safety dangers of these products. Depending on safety assessments, the FDA
26 should strongly consider removing any potentially tainted products from store
27 shelves.

28 32. On August 24, 2012, Congressman David Kucinich wrote to the Honorable Daniel
Levinson, Inspector General of the U.S. Department of Health and Human Services, to "request
an immediate investigation into the [FDA's] handling of thousands of complaints about illness
and death resulting from jerky treats for dogs."

1 33. Congressman Kucinich first noted that the FDA's warnings were insufficient to
2 protect pet owners and their pets. He stated that "[t]he FDA 'warnings' in this case constituted
3 mere press releases, requiring no action by the manufacturer, leaving unsuspecting pet owners to
4 feed their dogs poisoned treats."

5 34. Congressman Kucinich also noted that the FDA's inspection of facilities in China
6 was seriously flawed, and that the failure to conduct a proper inspection gave the false impression
7 that concerns about jerky treats were unfounded:
8

9 In April of 2012, FDA officials traveled to China to inspect jerky manufacturing
10 facilities. The results were not reassuring. **Upon arrival, the inspectors learned**
11 **that they would not be able to take samples back to the U.S. for analysis in a**
12 **U.S. lab. The FDA was, however, able to discover that the raw materials**
13 **(meat) were not being tested for contamination as required.**

14 The inspectors were also able to learn that the Chinese manufacturers claimed to
15 have received few, if any, complaints about their products, even though the FDA
16 claims to have transmitted the complaints to the manufacturers. **The inspection**
17 **reports paint a picture of factories that clearly cannot be trusted to produce**
18 **food fit for consumption. The FDA's inaction has effectively declared that the**
19 **food from these factories is perfectly fit for consumption.**

20 [Emphasis added.]

21 35. Congressman Kucinich also criticized the FDA's failure to request or require a
22 recall:
23

24 The FDA has defended its abject failure to act by claiming it does not have the
25 authority to do so until the adulterant(s) is (are) positively identified. It is true that
26 if the FDA has not identified an adulterant, it will not be able to initiate a
27 mandatory recall. The FDA has broad authority to request a voluntary recall at
28 any time.

29 36. Congressman Kucinich even called into question the competency and integrity of
30 the FDA itself, and noted that the FDA was not cooperative concerning his own investigations
31 into the matter:
32

33 The FDA has also defended its failure to act by claiming it cannot act on
34 complaints alone. **If, after five years of investigating, the FDA still has no**
35 **more clues about the chemical or biological culprit than the original**
36

1 **consumer complaints, the competency and/or integrity of the investigation is**
 2 **called into question.** I do not make this statement lightly.

3 My requests for information from the FDA as Ranking Member of the
 4 Subcommittee on Regulatory Affairs, Stimulus Oversight and Government
 5 Spending of the House Committee on Oversight and Government Reform have not
 6 met with the transparency necessary to perform oversight. When I first requested
 7 a meeting with the FDA about the complaints, I asked for "considerable scientific
 8 detail (about) the scope of potential biological and chemical contaminants for
 9 which testing has been conducted, the raw data from such testing with an
 10 accompanying summary, methodological protocols, and any other supporting
 11 qualitative and quantitative data." **I was given a one page data summary of**
 12 **highly aggregated, non-specific and incomplete data. After exchanges with**
FDA staff and requests for more data, including specific requests for the
results from the part of the investigation involving the trip to China and the
complaints, the information was released on their website, but neither my
office nor the Subcommittee staff was notified. The consumer complaints
 registered until late June of 2012, as well as the inspection reports from the trip to
 China, were buried in a lengthy Questions and Answers web page. Congressional
 efforts to perform oversight must not be thwarted.

13 [Emphasis added.]

14 **Safeway Voluntarily Stops Selling Milo's Jerky**

15 37. Even though the FDA failed to act to prevent Milo's Jerky from being sold to
 16 consumers, on August 23, 2012, the supermarket Safeway announced that its stores would no
 17 carry any Milo's dog treats, including Milo's Jerky, due to the health and safety issues discussed
 18 above.

19
 20 **Del Monte and Milo's Misrepresented**
The Wholesomeness and Safety of Milo's Jerky

21 38. Defendants printed misrepresentations concerning the wholesomeness and safety
 22 of Milo's Jerky on its packaging. Such misrepresentations include:

- 23 • "100% Real – Wholesome and Delicious"
- 24 • "We started making Milo's kitchen dog treats because we believe that your dog deserves
- 25 treats made with the same quality ingredients and care that you want with your food."
- 26 • "INGREDIENTS: Chicken Breast, Glycerin, Sugar, Salt, Natural Flavors, Mixed
- 27 Tocopherals (a Preservative and Natural Source of Vitamin E)"
- 28

1 39. Similar misrepresentations are made on the Del Monte and/or Milo's websites:

- 2 • "Good for Pets"
- 3 • "Milo's Kitchen Home-Style Dog Treats are 100% real jerky, sausage slices, and
- 4 meatballs. We believe dogs deserve treats made with the same quality ingredients and
- 5 care that you want with your food. We're pet parents too. That's why we make each treat
- 6 with the love and care your dog deserves."
- 7 • "Delicious, whole fillets of 100% jerky"
- 8 • "Each tasty piece of Milo's Kitchen Chicken Jerky is made with the quality and care your
- 9 dog deserves. There are not artificial chicken flavors or filler ingredients. Just meaty,
- 10 delicious whole fillets of 100% real jerky."
- 11 • "That's why we created Milo's Kitchen dog treats. Because in our kitchen, our dogs
- 12 deserve only the best, and we believe they deserve treats made with the same quality of
- 13 ingredients and care you want with your food. They deserve to enjoy snacks that not only
- 14 look like jerky, sausage slices, and meatballs, but actually are 100% real jerky, sausage
- 15 slices and meatballs. Nothing says, 'I love you' more than something made with love and
- 16 care."
- 17 • "Our products are made with nutritious, quality ingredients that meet the applicable
- 18 standards and specifications of the U.S. Department of Agriculture (USDA), Association
- 19 of American Feed Control Officials (AAFCO) and the Food & Drug Administration
- 20 (FDA). Each of our products is processed and packaged following strict quality-control
- 21 procedures that comply with the Good Manufacturing Practices established by the FDA.
- 22 Our Quality Assurance Program is based upon standards compliant with the Global Food
- 23 Safety Initiative and the FDA. These procedures ensure that the resulting food will be
- 24 wholesome and safe for your dog."
- 25 • "Recently, the U.S. Food and Drug Administration (FDA) posted a notice to make pet
- 26 parents aware that certain symptoms in dogs (including decreased appetite; decreased
- 27 activity; increased water consumption and/or increased urination) may be associated with
- 28

1 the consumption of chicken jerky treats made in China. To date, the FDA, American
2 Veterinarian Medical Association (AVMA) and several animal health diagnostic
3 laboratories in the U.S. have not been able to identify any definitive cause or connection
4 between the illness and treats. The FDA also reports that extensive testing of chicken
5 jerky treats has been conducted, but no contaminant has been found. In their notice, the
6 FDA advises consumers that chicken jerky products should not be substituted for a
7 balanced diet and are intended to be fed occasionally in small quantities.”

- 8 • “To date, the American Veterinarian Medical Association (AVMA), Food and Drug
9 Administration (FDA) and several animal health diagnostic laboratories in the U.S. have
10 not been able to identify any definitive cause or connection between the illness and
11 chicken jerky treats. The FDA reports that extensive testing of chicken jerky treats has
12 been conducted, but no contaminant has been found.”
- 13 • “There is no recall of Milo’s Kitchen chicken jerky or any other Milo’s Kitchen dog
14 treats. This is an issue that is not associated with any particular brand and to date FDA
15 and other agencies have been unable to identify any definitive cause or connection
16 between the illness and treats. Despite extensive testing, not contaminants have been
17 found.”

18 40. At some point in 2012, Milo’s issues a release titled “Safety and Quality
19 Assurance | Milo’s Kitchen® Chicken Jerky Dog Treats” which attempted to reassure consumers
20 that Milo’s Jerky was safe:

21 We understand dogs are part of our families and we share pet parents’ #1 priority
22 to keep their dogs safe and healthy. Pet parents can feel confident in treating their
23 dogs with Milo’s Kitchen® Chicken Jerky. We put Milo’s Kitchen® Chicken
24 Jerky through a detailed 17-step safety process, where it is required to pass quality
25 testing during every single phase. The American Veterinary Medical Association
(AVMA) and the FDA have identified no link between illness and chicken jerky
treats.

26 Additionally, no recalls have been issued for any chicken jerky dog treat product
27 in the United States. The makers of Milo’s Kitchen® have conducted our own
28 extensive internal testing, all of which has shown our Chicken Jerky to be safe for
dogs to enjoy. All Milo’s Kitchen® dog treats, including our chicken jerky variety,

1 are made with nutritious and quality ingredients that meet the standards and
2 specifications of the United States Department of Agriculture (USDA), the
Association of American Feed Control Officials (AAFCO) and the FDA.

3 To ensure that dog treats are both wholesome and safe for your dog, all of our dog
4 treats are packaged following strict quality-control procedures that are in
5 compliance with the Good Manufacturing Practices established by the FDA. Our
6 own Quality Assurance Program is based upon standards compliant with both the
Global Food Safety Initiative and the FDA. Further, our detailed 17-step safety
process requires quality testing during every single phase.

7 With regard to the reports about chicken jerky treats and "Fanconi-like
8 Syndrome," the FDA has thoroughly investigated the complaints. Chicken jerky
9 samples made in China were collected from all over the United States and were
10 found to be free of any toxins, after thorough and extensive testing. The FDA, the
American Veterinarian Medical Association (AVMA) and several animal health
11 diagnostic laboratories in the U.S. have identified no connection between the
illness and chicken jerky dog treats.

12 We started making Milo's Kitchen® dog treats because we believe dogs deserve
13 treats made with the same quality ingredients and care that we want for our food.
Each of our recipes is carefully prepared to bring out the flavors your dog loves,
14 without using artificial flavors or colors.

15 ***

16 41. These misrepresentations are false, deceptive, and/or misleading for the following
17 reasons:

- 18 a. Many packages of Milo's Jerky contain contaminants that sicken and/or kill dogs
19 and are thus not "wholesome."
- 20 b. A reasonable consumer would not want to eat human food made with the "same
21 quality ingredients and care" that cause such food to be contaminated, causing
22 sickness or death.
- 23 c. The ingredient list put forth fails to mention that that many packages of Milo's
24 Jerky also contain contaminants which sicken and/or kill dogs.
- 25 d. Milo's Jerky is not "good for pets" because many packages of Milo's Jerky
26 contain contaminants which sicken and/or kill dogs.
- 27
- 28

- e. Many packages of Milo's Jerky are not "100% jerky." Rather, many packages of Milo's Jerky have some percentage of contaminants that poison and/or kill dogs.
- f. Although Milo's Jerky, "is processed and packaged following strict quality-control procedures that comply with the Good Manufacturing Practices established by the FDA," many packages of Milo's Jerky are not free of contaminants that poison and/or kill dogs.
- g. While there is "no recall of Milo's Kitchen chicken jerky or any other Milo's Kitchen dog treats," many packages of Milo's Jerky contain contaminants that poison and/or kill dogs.
- h. While the AVMA has not been able to "identify any definitive cause or connection between the illness and" Milo's Jerky, many packages of Milo's Jerky contain contaminants that poison and/or kill dogs.
- i. Milo's "17-step safety process" does not ensure that Milo's Jerky is free of contaminants that poison and/or kill dogs.
- j. While the FDA conducted tests concerning jerky, including Milo's Jerky, and failed to find contamination, this investigation was fundamentally flawed, as detailed by Congressman Kucinich.

**Defendants Failed To Respond Adequately
To The Contamination In Milo's Jerky**

42. Defendants failed to respond adequately to the contamination in Milo's Jerky. For example:

- a. Defendants failed to conduct adequate quality control of Milo's Jerky;
- b. Defendants failed to adequately test Milo's Jerky;
- c. Defendants marketed and sold Milo's Jerky using deceptive advertising and packaging;
- d. Defendants failed to use proper manufacturing and production practices for Milo's Jerky;

- 1 e. Defendants failed to adequately investigate reports of dogs who became sick
2 and/or died after consuming Milo's Jerky;
- 3 f. Defendants failed to adequately warn consumers about the possibility of dangerous
4 contaminants in Milo's Jerky;
- 5 g. Defendants marketed Milo's Jerky without determining whether it was safe or
6 toxic to dogs;
- 7 h. Defendants sold Milo's Jerky without determining whether it was safe or toxic to
8 dogs; and
- 9 i. Defendants failed to take steps to remove Milo's Jerky from the market once the
10 unsafe condition of Milo's Jerky was suspected or became known.

11 **CLASS ACTION ALLEGATIONS**

12 43. Plaintiff brings this class action for injunctive relief, restitution and other equitable
13 and monetary relief on behalf of a class consisting of:

14 **All persons in the United States who purchased Milo's Jerky at any time from**
15 **2007 until the present.**

16 44. Excluded from the Class are Defendants, any entity in which Defendants have a
17 controlling interest, and Defendants' officers, directors, affiliates, legal representatives,
18 employees, co-conspirators, successors, subsidiaries and assigns.

19 45. Within the Class are four subclasses (collectively the "Subclasses") defined as
20 follows:

- 21 a. Healthy Screening Subclass. This subclass includes dog owners whose
22 dogs: (i) consumed Milo's Jerky, (ii) were sent to a veterinarian for screening or testing
23 because the pet consumed Milo's Jerky, and (iii) received screening or testing that proved
24 negative.
- 25 b. Injury Claims Subclass. This subclass includes dog owners whose pets: (i)
26 consumed Milo's Jerky, and (ii) were treated for symptoms or injuries related to the
27 consumption of Milo's Jerky but did not die as a result of such consumption.

1 c. Deceased Animals Claims Subclass. This subclass includes dog owners
2 whose dogs: (i) consumed Milo's Jerky and (ii) and ultimately died as a result of such
3 consumption.

4 d. Consumer Food Purchase Claims Subclass. This subclass includes dog
5 owners who purchased Milo's Jerky and seek a refund for unconsumed Milo's Jerky.

6 46. Plaintiff reserves the right to amend or modify the definition of the Class and
7 Subclasses with greater specificity or further division into subclasses or limitation to particular
8 issues as discovery and the orders of this Court warrant.

9 47. Members of the Class and the Subclasses are so numerous that joinder of all
10 members is impracticable. While the exact number of members of the Class and Subclasses is
11 presently unknown, and can only be ascertained through appropriate discovery, Plaintiff believes
12 that such individuals number in the tens of thousands.

13 48. There is a well-defined community of interest in the questions of law and fact
14 underlying the claims of each member of the Class and Subclasses, and these common questions
15 predominate over any questions that may affect individual members of the Class and Subclasses.
16 The common questions of fact and law include, but are not limited, the following:

17 a. whether information on Defendants' websites concerning Milo's Jerky was
18 false, deceptive, or misleading;

19 b. whether representations made on Milo's Jerky packaging are false,
20 deceptive, and/or misleading;

21 c. whether Defendants engaged in unfair, unlawful, and/or fraudulent
22 business practices;

23 d. whether Defendants defrauded consumers;

24 e. whether Milo's Jerky was materially defective in design and formulation,
25 and unfit for consumption by dogs;

26 f. whether Milo's Jerky was contaminated;

h. whether Defendants failed to warn of the dangers posed by consumption of Milo's Jerky;

j. whether Defendants were unjustly enriched.

50. Plaintiff will fairly and adequately represent and protect the interests of the Class and the Subclasses in that she is a typical purchaser of Milo's Jerky. Plaintiff has retained competent counsel with substantial experience in handling complex class action litigation. Plaintiff and her counsel are committed to vigorously prosecuting this action on behalf of the Class and the Subclasses.

52. Absent a class action, it would be highly unlikely that Plaintiff or any other members of the Class or Subclasses would be able to protect their own interests because the cost of litigation through individual lawsuits would exceed their expected recovery.

53. Certification is also appropriate because Defendants acted or refused to act on grounds generally applicable to the Class and Subclasses, thereby making appropriate the relief sought on behalf of the Class and Subclasses as a whole. Further, given the large number of consumers who purchased Milo's Jerky, allowing individual actions to proceed in lieu of a class action would run the risk of yielding inconsistent and conflicting adjudications.

1 54. A class action is a fair and appropriate method for the adjudication of the
2 controversy, in that it will permit a large number of claims to be resolved in a single forum
3 simultaneously, efficiently and without the unnecessary hardship that would result from the
4 prosecution of numerous individual actions and the duplication of discovery, effort, expense and
5 burden on the courts that such individual actions would engender. The benefits of proceeding as
6 a class action, including providing a method for obtaining redress for claims that would not be
7 practical to pursue individually, outweigh any difficulties that might be argued with regard to the
8 management of this class action.

9
10 **CAUSES OF ACTION**

11 **FIRST CAUSE OF ACTION**
12 **VIOLATION OF THE CONSUMER LEGAL REMEDIES ACT**
 (CAL. CIV. CODE §1750 et seq.)

13 55. Plaintiff incorporates by reference all the above allegations as if fully set forth
14 herein.

15 56. This First Cause of Action is asserted by Plaintiff on behalf of the Class under
16 California law.

17 57. Plaintiff and each member of the Class and Subclasses are "Consumers" as that
18 term is defined by Cal. Civ. Code §1761(d).

19 58. Milo's Jerky is a "Good" as that term is defined by Cal. Civ. Code §1761(a).

20 59. Defendants are "Persons" as defined by Cal. Civ. Code §1761(c).

21 60. The transaction involved herein is a "Transaction" as defined by Cal. Civ. Code
22 §1761(e).

23 61. Plaintiff and members of the Class and Subclasses are individuals who have
24 purchased Milo's Jerky for personal use, to feed their dogs. This cause of action is being asserted
25 on behalf of Plaintiff and members of the Class and Subclasses members who purchased Milo's
26 Jerky within the applicable statute of limitations period for this claim.

1 62. Plaintiff has standing to pursue this cause of action because she has suffered injury
2 in fact and has lost money or property as a result of Defendants' actions as set forth herein.
3 Specifically, Plaintiff purchased Milo's Jerky her personal and family use, to feed her dog Rocky,
4 in reliance on Defendants' marketing claims, both on the product labels and on Defendants'
5 websites, with respect to its efficacy, qualities, and safety. Plaintiff, and members of the Class
6 and Subclasses and their families, purchased Milo's Jerky, but it did not work as advertised, in
7 that it made dogs sick, and was not of the quality and standard advertised by Defendants.

8 63. Defendants have engaged in, and continue to engage in, business practices in
9 violation of California Civil Code §1750 et seq. (the "Consumers Legal Remedies Act") by
10 making false and unsubstantiated representations concerning the efficacy, qualities, and safety of
11 Milo's Jerky. These business practices are misleading and/or likely to mislead consumers and
12 should be enjoined.

13 64. Defendants have engaged in deceptive acts or practices intended to result in the
14 sale of Milo's Jerky in violation of Civil Code §1770. Defendants knew and/or should have
15 known that their representations of fact concerning the efficacy, qualities, and safety of Milo's
16 Jerky were material and likely to mislead the public. Defendants affirmatively misrepresented
17 that Milo's Jerky was of a certain standard and quality with certain benefits which it did not have.

18 65. Defendants have represented that Milo's Jerky has characteristics, uses, benefits,
19 or qualities that it does not have. The policies, acts, and practices heretofore described were
20 intended to result in the sale of Milo's Jerky to the consuming public, particularly consumers
21 seeking to provide their dogs with jerky treats that are not harmful, and thus Defendants have
22 violated and continue to violate California Civil Code §1770.

23 66. Defendants' conduct alleged herein violates the Consumers Legal Remedies Act,
24 including but not limited to, the following provisions: (1) using deceptive representations in
25 connection with goods or services in violation of Civil Code §1770(a)(4); (2) representing that
26 goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or
27 quantities which they do not have in violation of Civil Code §1770(a)(5); (3) representing that

1 goods or services are of a particular standard, quality or grade, if they are of another in violation
2 of Civil Code §1770(a)(7); and/or (4) advertising goods or services with intent not to sell them as
3 advertised in violation of Civil Code §1770(a)(9).

4 67. Defendants' practices, acts and course of conduct in connection with their
5 promotion and sale of Milo's Jerky, as described above, are likely to mislead a reasonable
6 consumer acting reasonably under the circumstances to his or her detriment. Like Plaintiff,
7 members of the putative Class and Subclasses would not have purchased Milo's Jerky if
8 Defendants had disclosed the truth and all facts concerning Milo's Jerky.

9 68. Plaintiff and members of the Class and Subclasses have each been directly and
10 proximately injured by the conduct of Defendants.

11 69. Plaintiff seeks restitution of all monies received by Defendants as a result of sales
12 from Milo's Jerky as provided in California Civil Code § 1780. Plaintiff is informed and believes
13 that the amount of said restitution is unknown at this time, but will seek relief to amend this
14 Complaint at the time of trial when the same has been ascertained.

15 70. Plaintiff seeks injunctive relief for the CLRA claims alleged in this Complaint.
16 Under the requirements of California Civil Code §1782(a), Plaintiff's counsel have served on
17 Defendants, contemporaneously with the filing of this Complaint, CLRA notice letters. Plaintiff
18 will amend this Complaint to assert claims for additional relief under the CLRA in the event
19 Defendants do not rectify these issues within the appropriate time period outlined in the CLRA

20 71. Defendants' wrongful business practices constituted and constitute, a continuing
21 course of conduct in violation of the Consumers Legal Remedies Act since Defendants are still
22 representing that Milo's Jerky has characteristics, uses, benefits and abilities which are false and
23 misleading and have injured Plaintiff and members of the Class and Subclasses.

SECOND CAUSE OF ACTION
VIOLATION OF FALSE ADVERTISING LAW
(CAL. BUS. & PROF. CODE §17500, et seq.)

72. Plaintiff incorporates by reference all the above allegations as if fully set forth herein.

73. This Second Cause of Action is asserted by Plaintiff on behalf of the Class and Subclasses under California law.

74. Plaintiff and members of the Class and Subclasses have standing to pursue this cause of action because Plaintiff and members of the Class and Subclasses have suffered injury in fact and lost money as a result of Defendants' actions as set forth herein. Specifically, Plaintiff and members of the Class and Subclasses purchased Milo's Jerky in reliance on Defendants' marketing claims, as described above. Plaintiff and members of the Class and Subclasses purchased Milo's Jerky, but it did not work as advertised and in fact caused injury.

75. Defendants have engaged in false advertising as they have disseminated false and/or misleading representations about Milo's Jerky.

76. Defendants knew or should have known by exercising reasonable care that their representations were false and/or misleading. During the Class Period, Defendants engaged in false advertising in violation of Cal. Bus. & Prof. Code §1750, et seq., by misrepresenting in its advertising and marketing of Milo's Jerky to Plaintiff, the Class, the Subclasses, and the consuming public that Milo's Jerky is safe and that Milo's Jerky and its ingredients have qualities and characteristics that they do not have.

77. Each of the aforementioned representations alleged in this Complaint was false and/or misleading because Milo's Jerky is not of the standard, quality, or grade-advertised and is in reality unsafe.

78. By disseminating and publishing these statements in connection with the sale of Milo's Jerky, Defendants have engaged in and continue to engage in false advertising in violation of Bus. & Prof. Code §17500, et seq.

1 79. As a direct and proximate result of Defendants' conduct, as set forth herein,
2 Defendants have received ill-gotten gains and/or profits, including but not limited to, money.
3 Therefore, Defendants have been unjustly enriched. Pursuant to Cal. Bus. & Prof. Code §17535,
4 Plaintiff seeks injunctive relief, restitution and disgorgement of Defendants' ill-gotten gains as
5 specifically provided in Cal. Bus. & Prof. Code §17535.

6 80. Plaintiff and members of the Class and Subclasses seek to enjoin Defendants from
7 engaging in these wrongful practices, as alleged herein, in the future. There is no other adequate
8 remedy at law and if any injunction is not ordered, Plaintiff and members of the Class and
9 Subclasses will suffer irreparable harm and/or injury.

10
11 **THIRD CAUSE OF ACTION**
12 **VIOLATION OF UNFAIR COMPETITION ACT**
 (Cal. Bus. & Prof. Code §17200, et seq.)

13 81. Plaintiff incorporates by reference all the above allegations as if fully set forth
14 herein.

15 82. This Third Cause of Action is asserted by Plaintiff on behalf of the Class under
16 California law.

17 83. Plaintiff has standing to pursue this cause of action because Plaintiff has suffered
18 injury in fact and lost money as a result of Defendants' actions as set forth herein. Specifically,
19 Plaintiff purchased Milo's Jerky in reliance on Defendants' marketing claims on both the product
20 labels and Defendants' websites. Plaintiff purchased Milo's Jerky, but it was not of the standard,
21 quality, and grade advertised.

22 84. Defendants' actions as alleged in this Complaint constitute an unfair or deceptive
23 business practice within the meaning of California Business and Professions Code §17200, et
24 seq., in that Defendants' actions are unfair, unlawful and fraudulent and because Defendant has
25 made unfair, deceptive, untrue or misleading statements in advertising media, including the
26 Internet, within the meaning of California Business and Professions Code §17200, et seq.

1 85. In advertising and packing Milo's Jerky, Defendants make false and misleading
2 statements concerning Milo's Jerky, and refuse to reveal true facts. Defendants do not have the
3 requisite competent and reliable evidence to support the claims about Milo's Jerky made in
4 Defendants' advertising and packaging.

5 86. Defendants' fraudulent and unfair business practices have caused economic injury
6 to Plaintiff and the putative Class and Subclasses.

7 87. Defendants' business practices, as alleged herein, are unlawful because they
8 violate the Consumers Legal Remedies Act and False Advertising Law, as set forth herein.

9 88. Defendants knew or should have known by exercising reasonable care that its
10 representations were false and/or misleading. During the Class Period, Defendants engaged in
11 unfair, unlawful and fraudulent business practices in violation of California Business and
12 Professions Code §17200, et seq., by misrepresenting in its advertising and marketing of Milo's
13 Jerky to Plaintiff, members of the Class and Subclasses, and the consuming public that, Milo's
14 Jerky was effective, safe, and had qualities and characteristics that it did not have.

15 89. Each of the aforementioned representations alleged in this Complaint was false
16 and misleading because Milo's Jerky was not of the standard, quality or grade advertised, and is
17 in reality unsafe and can cause dogs to become sick or even die.

18 90. Defendants' wrongful business practices constituted, and constitute, a continuing
19 course of conduct of unfair competition since Defendants are marketing and selling Milo's Jerky
20 in a manner likely to deceive the public.

21 91. As a direct and proximate result of Defendants' wrongful business practices in
22 violation of Business and Professions Code §17200, et seq., Plaintiff and members of the Class
23 and Subclasses have suffered economic injury by losing money as a result of purchasing Milo's
24 Jerky. Plaintiff and members of the Class and Subclasses would not have purchased or would
25 have paid less for Milo's Jerky had they known that it was not as represented.

26 92. Pursuant to Business and Professions Code §17203, Plaintiff and the Class seek an
27 order of this Court enjoining Defendants from continuing to engage in unlawful, unfair or
28

1 deceptive business practices and any other act prohibited by law, including those set forth in the
 2 Complaint. Plaintiff and members of the Class and Subclasses also seek an order requiring
 3 Defendant to make full restitution of all money they wrongfully obtained from Plaintiff and
 4 members of the Class and Subclasses.

5
 6 **FOURTH CAUSE OF ACTION**
UNJUST ENRICHMENT

7 93. Plaintiff incorporates by reference all the above allegations as if fully set forth
 8 herein.

9 94. This Fourth Cause of Action is asserted by Plaintiff on behalf of the Class under
 10 California law.

11 95. "The unjust enrichment claim can be made from common classwide proof."
 12 *Westways World Travel, Inc. v. AMR Corp.*, 218 F.R.D. 223, 239 (C.D. Cal. 2003) (certifying a
 13 nationwide class where plaintiffs alleged defendants were unjustly enriched through a common
 14 scheme.). "Although there are numerous permutations of the elements of the unjust enrichment
 15 cause of action in the various states, there are few real differences. In all states, the focus of an
 16 unjust enrichment claim is whether the defendant was unjustly enriched. At the core of each
 17 state's law are two fundamental elements – the defendant received a benefit from the plaintiff and
 18 it would be inequitable for the defendant to retain that benefit without compensating the plaintiff.
 19 The focus of the inquiry is the same in each state." *In re Mercedes-Benz Tele Aid Contract Litig.*,
 20 257 F.R.D. 46, 58 (D.N.J. Apr. 24, 2009), (quoting *Powers v. Lycoming Engines*, 245 F.R.D. 226,
 21 231 (E.D. Pa. 2007)).

22 96. Plaintiff and members of the Class and Subclasses conferred a benefit on
 23 Defendants by purchasing Milo's Jerky.

24 97. Defendants have been unjustly enriched in retaining the revenues derived from
 25 Class members' purchases of Milo's Jerky, which retention under these circumstances is unjust
 26 and inequitable because Defendants misrepresented the facts concerning the qualities,
 27
 28

1 characteristics, and safety of the product and caused Plaintiff and the Class to lose money as a
2 result thereof.

3 98. Defendants have benefited and have been unjustly enriched by their wrongful
4 conduct alleged herein. Defendants sold Milo's Jerky to Plaintiff and the members of the Class
5 and Subclasses based upon deceptive conduct, omissions, and misrepresentations as to uses and
6 qualities which Milo's Jerky does not possess and which Defendants were, and still are, aware
7 that it does not possess.

8 99. Defendants have knowledge of this benefit and have voluntarily accepted and
9 retained this benefit.

10 100. Plaintiff and members of the Class and Subclasses suffered a loss of money as a
11 result of Defendants' unjust enrichment because: (a) they would not have purchased Milo's Jerky
12 on the same terms, if at all, if the true facts concerning Milo's Jerky had been known; and (b) they
13 paid a price premium due to the false representations about Milo's Jerky.

14 101. The circumstances as described herein are such that it would be inequitable for
15 Defendants to retain these ill-gotten benefits without paying the value thereof to Plaintiff and
16 members of the Class and Subclasses members.

17 102. Plaintiff and members of the Class and Subclasses members are entitled to the
18 amount of Defendants' ill-gotten gains, including interest, resulting from Defendants' unlawful,
19 unjust, and inequitable conduct as described above.

20 PRAYER FOR RELIEF

21 WHEREFORE, Plaintiff and members of the Class and Subclasses request that the Court enter an
22 order or judgment against Defendants, and each of them as named in the future, as follows:

23 A. Certification of the action as a class action pursuant to Rule 23(b)(3) of the
24 Federal Rules of Civil Procedure, and appointment of Plaintiff as a Class representative and her
25 counsel of record as Class counsel;

26 B. Injunctive relief, and restitution, under the CLRA;

1 C. Restitution or restitutionary disgorgement as provided in California Business &
2 Professions Code § 17203;

3 D. Injunctive relief, restitution and appropriate relief under California Business &
4 Professions Code §17500;

5 E. Attorneys' fees and expenses, including costs for experts;

6 F. An injunction ordering Defendants to implement an effective remedy for the
7 Milo's Jerky; and

8 G. Awarding such other and further relief as this Court may deem just and proper,
9 including any extraordinary equitable relief and/or injunctive relief as permitted by law or equity
10 to attach, impound or otherwise restrict Defendants' assets to ensure that Plaintiff and the
11 members of the Class have an effective remedy.

12
13 Dated: October 16, 2012

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